

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

EFFICIENT MEDICAL TRANSPORT, INC.,  
PHOENIX TRANSPORTATION SERVICES, INC.,  
and MEDTRANS

Case 4-CA-25177

and

TEAMSTERS LOCAL 331 a/w INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS, AFL-CIO

*Donna Brown, Esq.*,  
for the General Counsel.  
*Joseph Piazza, Esq.*, Pennsauken, New Jersey,  
for the Respondent.  
*David L. Tucker*, Pleasantville, New Jersey,  
for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on April 3-4, 1997. The charge was filed August 8, 1996<sup>1</sup> and the complaint was issued December 31, 1996.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Prior to October 1, Efficient Medical Transport, Inc. (EMT or Efficient), a corporation, with headquarters in Pennsauken, New Jersey, provided medical transportation (e.g. ambulance) services. Phoenix Transportation Services Company, Inc., was a payroll services company for EMT, which may have nominally been the employer of Efficient's employees. On or about October 1, MedTrans purchased the business of Efficient and since then has

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<sup>1</sup> All dates are in 1996 unless otherwise indicated.

operated Efficient's business in a basically unchanged form.<sup>2</sup> In 1996 Efficient derived gross revenues in excess of \$1,000,000 and received revenues in excess of \$50,000 directly from points located outside the State of New Jersey. Phoenix derived revenues in excess of \$50,000 from EMT. I find that Efficient and Phoenix were a single employer who engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Medtrans is their successor employer. I also find that the Union is a labor organization within the meaning of Section 2(5) of the Act.<sup>3</sup>

## II. Alleged Unfair Labor Practices

The General Counsel alleges that Respondents discharged Michael Hewitt on July 24, 1996, in violation of Section 8(a)(1) and (3) because he supported and assisted the Union. For the reasons stated below, I conclude that the General Counsel had failed to make a prima facie case of discrimination.

### *Michael Hewitt's employment with Efficient Medical Transport*

Michael Hewitt worked as an emergency medical technician for Efficient Medical Transport from February 1995 until July 24, 1996, when he was fired. His duties were to drive an ambulance to transport patients from one medical facility to another and to resuscitate patients when necessary. Prior to his discharge Hewitt had not received any warnings, suspensions or any other kind of discipline. Several weeks prior to his discharge Hewitt had signed a Union authorization card and participated in an organizing campaign.

### *The Union's organizing campaigns*

Teamsters Local 331 attempted to organize Respondent's employees in 1995. The Union lost an NLRB election that summer. In the summer of 1996, the Union's business agent and organizer, Thomas Willett, ran into employee Lynne Dentino at a grocery store. Dentino told Willett that there was renewed interest amongst Respondent's employees in the Union. Dentino and Willett arranged for Willett to meet with some employees to start another organizing drive.<sup>4</sup>

When Willett arrived at the meeting site there were somewhere between 13 and 15 employees present. Among them were Michael Hewitt and his partner, Jennifer Brady, and

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<sup>2</sup> MedTrans is apparently a subdivision of Laidlaw Medical Transportation, Inc. (Exh. Jt.-2, Tr. 23).

<sup>3</sup> Respondent has raised no substantial argument to support its contention that MedTrans is not a successor employer to EMT/Phoenix, or that Efficient and Phoenix were not a single employer for purposes of the Act.. After the purchase of EMT, Medtrans provided the same services with the same employees reporting to same supervisors. There was virtually no change in the operation of the business after October 1. Likewise, Phoenix and Efficient had the same supervisors. Phoenix appears to have been no more than the payroll accounting department of Efficient.

<sup>4</sup> The record is not clear as to the dates when Respondent's employees met with Willett. Hewitt testified that the second meeting between employees and Willett occurred on July 6. I conclude that the meetings and organizing drive occurred sometime in early to mid-July.

Dentino and her partner, David Niederhofer. In addition to driving an ambulance, Niederhofer was Respondent's supervisor for Atlantic County, New Jersey.

When introduced to Niederhofer, Willett told him he would have to stand apart from the other employees because he was a member of management. Niederhofer did so. At the end of the meeting a number of employees signed cards authorizing the Union to represent them, including Niederhofer and Hewitt. A number of these employees solicited other employees to sign authorization cards. There was a second meeting with Willett soon after the first and then the organizing drive ended. The General Counsel contends that Hewitt was conspicuous in the 1996 organizing drive. I conclude that the preponderance of the evidence does not support this contention. Even if Hewitt was conspicuously active in the campaign there is no evidence that Respondent was aware of this fact or bore animus towards his union activities.

*Resolving the conflicting evidence regarding Michael Hewitt's role in the organizing drive*

Hewitt testified that at a meeting with Willett, the Union representative asked for volunteers to distribute authorization cards. Only three employees volunteered, Hewitt, Dentino and Daniel Zane. Hewitt also testified that he took some authorization cards and with the assistance of his partner, Jennifer Brady, solicited a number of employees.

Brady was fired by Respondent on November 9, 1996. She was subpoenaed to testify by Respondent. Brady stated that everybody was soliciting other employees to sign authorization cards and that Hewitt had no special role in the organizing campaign. According to Brady, the only employee who stood out in the organizing campaign was Lynne Dentino.

Dentino also testified that there was nothing significant in Hewitt's role in the organizing campaign. She stated that at a second meeting between Willett and Respondent's employees, Willett asked for volunteer organizers. Dentino testified that nobody volunteered.

Willett testified that at the first meeting Hewitt immediately approached him, expressed his concerns and his support for the Union. He stated that on several occasions during the meeting Hewitt came to him to explain things. Willett described Hewitt as being the most knowledgeable employee and the one who "showed the most direction and interest." Willett also characterized Hewitt as his main contact in the organizing drive. After the meetings Hewitt called Willett on several occasions and visited his office twice.

I credit the testimony of Brady and Dentino and find that other employees, including Niederhofer, were not aware of any special role that Hewitt had in the organizing campaign. So far as this records shows, I conclude that Niederhofer was aware that Hewitt supported the Union to the same extent as a number of other employees. There is no evidence that Respondent was aware of Hewitt's union activity other than through Niederhofer.

The General Counsel attempted to attack Brady's credibility. Hewitt testified that he never made certain statements, which reflected adversely on his reputation for veracity, to Brady. However, it was Dentino, rather than Brady, who testified about these statements. Hewitt's wife speculated that Brady might harbor some animus towards her husband because Brady had at one time been romantically interested in him. I find Brady's testimony completely credible. Even if she harbored animus towards Hewitt, it was likely more than offset by animus towards the Respondent for terminating her employment. Moreover, her testimony is corroborated by Dentino and uncontradicted by anyone other than Hewitt. Finally, when Hewitt

was asked who could corroborate his testimony about his union activities, he mentioned Brady and nobody else (Tr. 89-93).

*The evidence regarding animus towards Michael Hewitt's union activity*

Michael Hewitt testified that shortly after a third meeting with Willett, David Niederhofer told him that "I think we ought to back off the union now. We're going to have casino contracts. We're not going to need it anymore" (Tr. 94).<sup>5</sup> Hewitt stated this was not said in a threatening manner and came up in the course of passing conversation. Hewitt did not respond to the remark. Niederhofer denies making the remark. I am unable to conclude that Niederhofer made the remark attributed to him. Hewitt's testimony is not corroborated and there is no other evidence of hostility or even opposition by Niederhofer to the organizing campaign. There is no reason for Niederhofer to express his opposition to a continuation of the campaign only to Hewitt, if he was interested in sabotaging it.

Hewitt's wife, Tara, testified that the day after Michael Hewitt was fired, David Niederhofer met with employees and told them that they did not need the Union anymore because Respondent had entered into contracts with several casinos. I do not credit this testimony because of the lack of corroboration and Mrs. Hewitt's obvious interest in the outcome of this proceeding. She was fired by Respondent a week after her husband and has a lawsuit pending against the company.<sup>6</sup>

The only other evidence of animus is Hewitt's testimony that immediately after this conversation, Niederhofer began to closely scrutinize his work performance. While the record demonstrates that Niederhofer paid close attention to Hewitt's performance in the week prior to his termination, there is no credible evidence linking this development to Hewitt's union activity.

*The reasons given by Respondent for terminating Michael Hewitt*

On Friday, July 19, Hewitt and his partner, Jennifer Brady took an ambulance out of service because they believed, apparently mistakenly, that one wheel was secured by only two lugnuts. David Niederhofer testified that although only two lugnuts were visible, the wheel was actually secured by several other lugnuts located behind the hubcap. According to Niederhofer, Hewitt drove his ambulance back to Respondent's dispatch point after making a service call with a replacement ambulance.

Niederhofer believes that Hewitt could have driven his ambulance back to his base before the service call, rather than forcing Respondent to dispatch another driver with a replacement vehicle. Niederhofer stated that this incident was a minor factor in Hewitt's

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<sup>5</sup> Dentino, Niederhofer and Willett testified that there were only 2 meetings. Brady could only recall one.

<sup>6</sup> Tara Hewitt was fired for insubordination after a telephone conversation with John Eagle. The conversation concerned letters solicited by Respondent from all or most of its employees in Atlantic county. These letters stated that the employees did not wish to work with Mrs. Hewitt.

discharge. However, he also testified that the decision to fire Hewitt was made by Director of Operations John Eagle, not himself.<sup>7</sup>

5 Niederhofer testified further that after the replacement ambulance was returned to employee Lynne Dentino, she complained that trash and dirty linen had been left in it. Dentino, however, testified that Hewitt and Brady did not use her vehicle.

10 At about the same time Niederhofer says he received complaints from a number of ambulance drivers that the oxygen cylinders in their vehicles had not been secured. He contends this was something that Hewitt was supposed to do on Sunday, July 21.

15 Very late in the evening of July 23, Hewitt and Brady were directed by Respondent's dispatcher to take a patient from Summers Point, New Jersey to Vineland, a 2-hour round trip. They finished this assignment between 1:00 and 2:00 a.m. on July 24. Hewitt dropped Brady off and told her he would turn in the paperwork that they needed to turn in for Respondent's billing purposes. Hewitt drove the ambulance home. On the morning of July 24, Hewitt's wife drove the ambulance to work. Respondent contends that it was a violation of company rules for Hewitt to take the ambulance home and that Hewitt's wife was not authorized to drive it. I credit Respondent's testimony in this regard over that of Hewitt.

20 The next day Niederhofer was informed by B. J. Anderson, Respondent's vice-president for operations, that there were no records for Hewitt and Brady's trip to Vineland the night before. Anderson told him that if employees could not fill out paperwork properly they should be terminated.

25 Niederhofer called Jennifer Brady and she informed him that Hewitt had told her that he would turn in the records for the Vineland trip. Niederhofer also tried to reach Hewitt without success. At about 2 p.m. on July 24, Niederhofer found the paperwork for the Vineland trip in Hewitt's ambulance. It did not accurately reflect the mileage or duration of the trip to Vineland.

30 Later in the day, Niederhofer called John Eagle, Respondent's Director of Operations. They discussed all of the above incidents and, according to Niederhofer, Eagle directed him to terminate Hewitt's employment. Eagle testified that it was the failure to secure the oxygen bottles that caused him to order Hewitt's termination. He also stated that driving the ambulance home on July 24 would also have been grounds for immediate termination. However, in a September 9, 1996, memorandum, Eagle stated that Niederhofer terminated Hewitt and that Niederhofer's reports indicate that Hewitt was terminated for "numerous work rule violations". G.C. Exh. 5, Also see G.C. Exh. 8.

40 Michael Hewitt contends that he laid the oxygen cylinders on the stretcher so that the ambulance crews could tell they were full. Hewitt contends that Niederhofer tacitly approved of this procedure, after initially objecting to it. I am unable to credit this testimony in part because Hewitt's testimony at Tr. 78 and Tr. 109 appears to be internally inconsistent as to whether Niederhofer objected to his laying the oxygen bottles on the stretchers.

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<sup>7</sup> As described below, Respondent's evidence is conflicting as to whether Hewitt was fired by Niederhofer or Eagle.

### Analysis

In order to prove that an employer violated Section 8(a)(1) and (3) in terminating an employee, the General Counsel must show that union activity has been a substantial factor in the employer's decision. Then the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in Union or other protected activity. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981).

To establish discriminatory motivation the General counsel generally must show union or other protected activity, employer knowledge of that activity, animus or hostility towards that activity and a causally-related adverse personnel action. Inferences of knowledge,<sup>8</sup> animus<sup>9</sup> and discriminatory motivation<sup>10</sup> may be drawn from circumstantial evidence rather than from direct evidence.

In the instant case it is uncontroverted that Michael Hewitt engaged in protected union activity. He signed a Union authorization card, expressed his support for the Union and solicited other employees to join the Union. It is also clear that Respondent was aware of some of this union activity through David Niederhofer, whom it admits was a supervisor within the meaning of the Act.

What is missing from this case is any evidence of animus towards Hewitt's union activity. Since I have not credited Hewitt's testimony with regard to Niederhofer's admonition to "back-off" from the organizing campaign, there is no direct evidence of animus. Moreover, even if I had credited this testimony, there would be no such evidence. Hewitt testified that the statement was made in passing in a non-threatening tone of voice. Further there is no substantial evidence rebutting Niederhofer's contention that he was not opposed to the organizing drive and in fact was in favor of it.<sup>11</sup>

There is also insufficient evidence of disparate treatment from which I can infer discrimination in Hewitt's termination. Other employees who were not disciplined for infractions similar to Hewitt's were also union supporters. For example, Respondent would have more effectively discouraged its employees from joining the Union on July 24, if it had also discharged Brady, who it could have held responsible for most of the same transgressions as Hewitt. Thus, I can draw no inferences from the fact that Hewitt was terminated and Brady was not.

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<sup>8</sup> *Flowers Baking Company, Inc.*, 240 NLRB 870, 871 (1979).

<sup>9</sup> *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1996).

<sup>10</sup> *W. F. Bolin Co. v. NLRB*, 70 F. 3d 863 (6th Cir. 1995).

<sup>11</sup> I give no weight to Thomas Willett's testimony that Niederhofer's name "came up in an anti-union sense in the last [1995] election (Tr. 208)." There is no identification of who attributed anti-union activity to Niederhofer. Moreover, Willett's testimony if credited would only establish that Niederhofer was opposed to the Union in 1995. One would have to show more to establish animus. Niederhofer testified that Respondent's failure to deliver on various promises to employees led to him to actively support the Union in 1996.

*The inconsistencies, contradictions and shifting explanations given by Respondent for Michael Hewitt's discharge do not establish that Respondent's true motive was a violation of the Act.*

In *Precision Industries*, 320 NLRB 661 (1996), the Board observed that, "Having  
 5 discredited the Respondent's explanations for its actions, the judge was entitled to infer that there was another reason, but it does not necessarily follow that the real reason was grounded in antiunion animus. Those explanations might have been offered in an attempt to conceal a violation of some other statute instead of the Act, or a motive that may have been base but not unlawful at all. Consequently we reject any suggestion that the 'inconsistencies,  
 10 contradictions, improbabilities and aberrational and shifting explanations' in the testimony of the Respondent's witnesses 'necessarily compel' the conclusion that the Respondent's true motive in implementing those processes was discriminatory within the meaning of the Act."

There are a number of factors regarding Michael Hewitt's termination that are sufficient  
 15 to make one suspicious as to Respondent's motivation in discharging him. However, the failure of the General Counsel to otherwise prove antiunion discrimination renders these suspicions insufficient to infer a violation of the Act. Efficient had a progressive discipline policy and prior to his termination, Hewitt had never been disciplined. John Eagle's response is that failure to secure oxygen cylinders is grounds for immediate termination. However, Respondent's  
 20 evidence in this regard is far from overwhelming.

Niederhofer testified that, when he called Eagle, they discussed Hewitt's failure to secure oxygen cylinders in all the ambulances on Sunday, July 21. However, there is nothing in Niederhofer's description of the conversation at Tr. 160 that indicates that he gave Eagle the  
 25 impression that Hewitt was endangering other employees or patients. To the contrary, Niederhofer's account suggests that he was annoyed because Hewitt left work for others that he had plenty of time to do himself.

Eagle's testimony about this conversation is simply that when Niederhofer got to the  
 30 infractions about the oxygen bottles he decided to terminate Hewitt. First, Respondent's evidence is conflicting as to whether Niederhofer or Eagle fired Hewitt. Second, its evidence that it fired Hewitt, an employee with a perfect work record up until July 17, without warning, for being lazy on one Sunday, is not convincing. In this regard I deem it significant that Niederhofer's account of his conversation with Eagle suggests that Eagle did not tell him that  
 35 he was firing Hewitt for the latter's failure to secure the oxygen cylinders.

Additional skepticism as to Respondent's motivation arises from Niederhofer's testimony that before he talked to Eagle, vice president B. J. Anderson suggested that Hewitt should be terminated for failing to fill out the paperwork properly for the Vineland trip. This also suggests  
 40 that the failure to secure the oxygen bottles was not the real reason for his termination.

Finally, Respondent orchestrated a letter writing campaign immediately following Michael Hewitt's termination to get fellow employees to state that they were unwilling to work with his wife. She was terminated on July 31, one week after her husband, allegedly for  
 45 insubordination when she questioned Eagle about these letters. This may also evidence of an ulterior motive for the discharges of Michael and Tara Hewitt.

In summary, the record suggests that there are other reasons than those stated by Respondent for firing Michael Hewitt without prior warning. However, there is insufficient evidence to conclude that his union activity, which appears to have been quite unremarkable, was related to his discharge. There is insufficient evidence to infer knowledge of that activity on the part of any supervisor other than Niederhofer, animus towards that activity and a link

between his union activity and termination.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>12</sup>

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ORDER

The complaint is dismissed.

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Dated, Washington, D.C. June 9, 1997

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Arthur J. Amchan  
Administrative Law Judge

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<sup>12</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.